STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ATLANTIC CIVIL, INC.

Petitioner,

vs. Case No. 15-1746

FLORIDA POWER AND LIGHT COMPANY
AND DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.
_____/
CITY OF MIAMI,

Petitioner,

vs. Case No. 15-1747

FLORIDA POWER AND LIGHT COMPANY
AND DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.
_____/

PETITIONER ATLANTIC CIVIL, INC.'S PROPOSED RECOMMENDED ORDER

The final hearing in this case was held November 2-4, 2015, in Miami, Florida, before Bram D. E. Canter, Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

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STATEMENT OF THE ISSUES

The issue to be determined in these consolidated cases is whether Florida Department of Environmental Protection Administrative Order 14-0741, dated December 23, 2014, is an unreasonable exercise of the Department's enforcement discretion

or an otherwise invalid exercise of the Department's authority.

PRELIMINARY STATEMENT

On December 23, 2014, the Department of Environmental Protection ("DEP") entered Administrative Order 14-0741 (the "AO") making findings of fact and ordering Florida Power & Light Company ("FPL") to submit to DEP within 90 days a detailed management plan to address salinity issues within FPL's Cooling Canal System ("CCS") at its Turkey Point Power Plant in southeast Miami-Dade County ("Turkey Point").

On February 9, 2015, Petitioner Atlantic Civil, Inc. ("ACI") filed its petition for a formal administrative hearing challenging the AO. By order dated March 30, 2015, the Administrative Law Judge consolidated DOAH Case Nos. 15-1744, 15-1745, 15-1746, and 15-1747, which involved similar challenges to the AO by Tropical Audubon Society, Inc., Blair Butterfield, Charles Munroe and Jeffrey Mullins; Miami-Dade County; ACI; and the City of Miami. On April 16, 2015, FPL filed a motion to dismiss these petitions. That motion was denied by Order dated April 24, 2015.

On August 24, 2015, Jeffrey Mullins filed his Notice of Voluntary Dismissal. On October 9, 2015, Miami-Dade County filed its Notice of Voluntary Dismissal. On October 30, 2015, Tropical Audubon Society, Inc., Blair Butterfield, and Charles Munroe filed their Agreed Notice of Voluntary Dismissal.

At the final hearing, Joint Exhibits 1-3 and 5-7 were admitted into evidence. DEP presented the testimony of: Phillip Coram, P.E., accepted as an expert in environmental engineering; Terrie Bates; and Jefferson Giddings, accepted as an expert in groundwater modeling. DEP Exhibits 2, 6, 7, 10, 11, 13, 15, and 16 were admitted into evidence.

FPL presented the testimony of: Michael Sole; Steven Scroggs, accepted as an expert in power plant engineering, design, and siting; and Peter Anderson, P.E., accepted as an expert in groundwater hydrology, and groundwater flow and transport modeling. FPL Exhibits 1-6, 9, 11, 14, 15, 25, and 26 were admitted into evidence.

ACI presented the testimony of: Stefano Torcise; Marc Harris; William Nuttle, Ph.D., accepted as an expert in water salt budget analysis; and Edward Swakon, P.E., accepted as an expert in groundwater resources and groundwater monitoring. ACI Exhibits 7-9, 11, 31, 33, 34, 63, and 66 were admitted into evidence.

The City of Miami presented the testimony of: Mark Crisp, P.E., accepted as an expert in design and function of electrical generating facilities and cooling systems; and Miguel Augustin. City Exhibits 40, 43, and 47[1] were admitted into evidence.

[1] City of Miami Exhibit 47 was admitted as a proffer. T5-606:8.

The five-volume transcript of the final hearing was filed with DOAH. The parties filed proposed recommended orders that were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. Petitioner, Atlantic Civil, Inc. ("ACI"), is a Florida corporation with its principal place of business in Miami, Florida. ACI owns 2,598 acres of land in southeastern Miami-Dade County approximately four miles due west of Turkey Point and the CCS. ACI has used its property for active agriculture and limestone mining for decades and continues to do so. Prhrg. Stip., ¶¶ V. W-X.[2]

2. The Biscayne Aquifer is the sole source of fresh water for the ACI Property. ACI withdraws and uses water from the Biscayne Aquifer pursuant to South Florida Water Management District ("District") Water Use Permit No. 13-03608-W and Permit No. 13-03796-W. ACI-08; ACI-09; Prhrg. Stip., ¶ V. Y.

3. DEP issued ACI a Life-of-the-Mine Environmental Resource Permit for mining activities on the ACI Property. ACI-07. Under this permit, if any groundwater monitoring well profile, mine pit profile, or monitoring well sample analysis

[2] Citations to the hearing transcript will be "T followed by the volume number, page number and line number. For example, "T1-100:15" indicates hearing transcript volume 1, page 100, line 15.

results in an exceedance of salinity – measured as a specific conductivity threshold of 1.07 mS/cm (150 mg/L chloride) – ACI must immediately notify DEP. If the groundwater monitoring data shows that chloride concentrations greater than 250 mg/L are occurring within the mine pit, DEP's permit prohibits ACI from mining its property. Id.; Prhrg. Stip., ¶ V. Z.

4. Petitioner, City of Miami, is a municipal corporation incorporated in 1896 and located in Miami-Dade County, approximately 25 miles north of Turkey Point. Prhrg. Stip., ¶ V. V.

5. DEP is the state agency authorized under § 403.061(8), Fla. Stat., to issue orders necessary to effectuate the control of air and water pollution.

6. FPL is a regulated public utility that owns and operates Turkey Point. JOINT-01, ¶¶ 2-4.

Background

7. Turkey Point is situated on 11,000 acres of land adjacent to Biscayne Bay in southeastern Miami-Dade County and sits on top of the Biscayne Aquifer. Turkey Point consists of five power generating units and the CCS. JOINT-01, ¶¶ 2-4.

8. In 1973, FPL completed construction of the CCS for the purpose of cooling industrial wastewater that it uses in the power generating units. JOINT-01, ¶ 5. The heated industrial wastewater is discharged into the CCS and, as it moves through

the CCS, a significant volume of the water is lost to evaporation, leaving behind concentrated, salty water in the CCS.T1-91:10-22. Since 1973, salinity levels in the CCS have slowly increased and have ranged from 25 PSU to about 65 PSU.[3] DEP-11-000029.

9. In 2008, DEP certified the "uprate" of nuclear units 3 and 4, whereby Units 3 and 4, which predated the Power Plant Siting Act, were certified under State License PA03-45 and approved for physical changes to increase their combined power generation capacity from 1,400 mgwtz to 1,608 mgwtz, an increase of 14%. T2-243:4-13; JOINT-07-000006-000007.

10. In the Final Order DEP found that the increased electrical generation from Units 3 and 4 would slightly increase the temperature and salinity of the water in the CCS.

11. However, following the uprate of Units 3 and 4 in 2013, the temperature and salinity in the CCS increased significantly, ranging from 55 PSU to over 90 PSU. JOINT-01, ¶ 33; T3-372:11-19; T4-495:14-496:23.

12. The CCS canals are dug from porous rock and are unlined. As a result, hypersaline industrial wastewater from

[3] A PSU (Practical Salinity Unit) is roughly equivalent to 1,000 mg/L Total Dissolved Solids ("TDS"). T4-560:1-15. Sea water has a salinity of approximately 35 PSU, which equates to 35,000 mg/L TDS. Id. The CCS is the only source in the area of water with a salinity over 35 PSU. T4-566:11-23; ACI-66.

Turkey Point continuously seeps through the bottoms of the canals into the Biscayne Aquifer, where it sinks to the bottom of the Aquifer and spreads radially in all directions. T1-92:7-22; T3-422:10-16, 428:22-429:4; T4-463:3-464:7.

13. This seepage carries salt from the CCS into the Aquifer.[4] FPL's salt balance model identified an average daily loading of approximately 600,000 pounds of salt per day from the CCS into the Biscayne Aquifer. JOINT-01, ¶ 23. However, the District calculated the daily salt load into the Aquifer from the CCS at approximately 3,000,000 pounds per day.[5]

Groundwater Conditions in Southeast Miami-Dade County.

14. The natural gradient and groundwater flow in the Biscayne Aquifer is from west to east – from the Everglades toward Biscayne Bay. T3-417:19-20, 433:21-435:17.

15. The line of saltwater intrusion in the groundwater of the Biscayne Aquifer (the fresh water/saltwater interface) is stable in most locations within Miami-Dade County, except in the vicinity of the CCS. T5-772:5-7.

16. When FPL began operating the CCS in 1973, the

[4] Additionally, FPL testified that it has recently dredged the bottoms of the CCS canals which will result in an even ***greater*** connection between the CCS and the aquifer. T4-499:18–500:1; 501:21–502:9.

[5] ACI-63-000008 (this figure was derived using the long term seepage loading to the aquifer of 1,000,000 ft^3 and assuming a long-term average salinity of 50 PSU).

groundwaters of the Biscayne Aquifer, including those beneath the CCS, were classified as Class G-II potable waters.[6] JOINT-06-000024-25.

17. In 1983, at FPL's request, DEP amended FPL's industrial wastewater permit to reclassify the groundwater immediately beneath the CCS from Class G-II to Class G-III. Id.

18. This reclassified area was designated as a zone of discharge into the groundwater for the CCS and was specifically described as the area bounded by the interceptor ditch on the west and Biscayne Bay on the east.[7] JOINT-06-000025.

19. The Department has not reclassified any other groundwater in the Biscayne Aquifer from Class G-II to Class G-III. T2-179:23-180:7, 199:4-7.

20. Documentation from the early 1980s indicates that the G-II/G-III groundwater boundary or interface "lay just west of

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[6] Rule 62-520.410(1), F.A.C., defines the designated use of Class G-II groundwater as: "Potable water use, ground water in aquifers with a total dissolved solids content of less than 10,000 mg/L ...." The designated use of Class G-III groundwater is: "Non-potable water use, ground water in unconfined aquifers with a total dissolved solids content of 10,000 mg/L or greater...."

[7] To the extent the Department or FPL contends that there is no permit-specified zone of discharge for the CCS, Rule 62-520.465(1), F.A.C., imposes a zone of discharge extending to FPL's property line. See also T2-178:6-179:22. The term "Zone of Discharge" is defined as "a volume underlying or surrounding the site and extending to the base of a specifically designated aquifer or aquifers, within which an opportunity for the treatment, mixture or dispersion of wastes into receiving ground water is afforded." Fla. Admin. Code R. 62-520.200(27).

the CCS interceptor ditch." ACI-66. Even by FPL's estimations, Class G-III groundwater historically did not reach the location of monitoring well TPGW-5D, which is about three miles west of the CCS, over a half a mile east of monitoring well G-21 and over a mile and a half east of well TPGW-7. ACI-11-000712; ACI-34.[8]

21. Recognizing at the outset that seepage from the CCS would inevitably occur, FPL built an 18-foot deep interceptor ditch in 1973 along the west side of the CCS to create a hydraulic barrier to prevent CCS water from migrating westward. JOINT-01, ¶ 6; T1-102:25-103:23.

22. Under multiple agreements with the District[9], FPL committed to the District that it would "operate the interceptor ditch system to restrict movement of saline water from the cooling canal system to those amounts which would occur without the existence of the cooling canal system." JOINT-01, ¶ 8; JOINT-05-000005; T2-245:2-13.

23. The Fifth Supplement provided that, if the interceptor ditch was not effective in preventing movement west of the L-31E canal, if the 2009 monitoring data indicated harm or potential

[8] See Figure 5.2-26, which shows FPL'S estimation of the approximate historical westward limit of what is now defined by DEP as Class III groundwater. ACI-11-000606.
[9] This original agreement was modified several times. The current version of the agreement, modified in 2009, is called the Fifth Supplemental Agreement or "Fifth Supplement." T2-243:14-244:12.

harm to the resources of the District, or if the CCS water was impacting water quality under Chapter 373, Fla. Stat., FPL would, upon notification by the District, "begin consultation with the District to identify measures to mitigate, abate or remediate impacts from the CCS and to promptly implement those approved measures." JOINT-05-000008.

24. The interceptor ditch system has failed to restrict the westward movement of CCS water in the deeper portions of the Biscayne Aquifer. JOINT-01, ¶ 24; T1-104:19-105:1; T2-249:14-24.

25. The continuous seepage of the hypersaline water from the CCS has created a large saltwater "plume" or "wedge" that is pushing westward through the Biscayne Aquifer and toward ACI's properties at an estimated rate of 525 to 660 feet per year. JOINT-01, ¶ 23.

Regulatory Authority Governing the CCS

26. The CCS operates under a combined National Pollutant Discharge Elimination System ("NPDES") permit and Industrial Wastewater ("IW") permit, is subject to Conditions of Certification in the Turkey Point Site License, and is governed by a series of contractual agreements between FPL and the District that originated at the inception of the CCS. JOINT-02, 05 & 06.

27. DEP last issued an NPDES/IW permit to FPL for the CCS in 2005. The permit expired in 2010, but has been

administratively extended since that time. JOINT-06; T2-173:22-174:4, 229:1-9.

28. The NPDES/IW permit prohibits FPL's groundwater discharge from causing a violation of the Minimum Criteria for Groundwater specified in Rule 62-520.400, F.A.C. JOINT-06, pg. 7. However, the NPDES/IW permit requires no groundwater monitoring to ensure compliance or to detect contaminants leaving the FPL zone of discharge.

29. In 2009, before the NPDES/IW permit expired, FPL filed a renewal application. T5-610:17-612:7. At that time, the District advised DEP that it believed the CCS plume was a violation of FPL's NPDES/IW permit. T5-612:13-17.

30. In October 2009, the Department asked its Southeast District Office to review FPL's NPDES permit renewal application. ACI-66. The Department relies on its Southeast District Office to address compliance issues for Turkey Point. T5-612:24-613:9.

31. In response to this request, Tim Powell, DEP Southeast District Wastewater Permitting Supervisor, reported multiple violations by FPL of DEP's groundwater standards. T5-613:5-617:25; ACI-66. Mr. Powell reported that data collected by the District in February and March 2009 showed that hypersaline water from the CCS caused exceedances of primary and secondary groundwater standards in the Biscayne Aquifer. ACI-66.

32. Mr. Powell noted that the primary groundwater water standard for sodium is 160 mg/L, and that multiple wells located adjacent to and miles west of the CCS contained sodium levels more than 10 times greater than DEP's standard. ACI-66.

33. Despite the District and Mr. Powell's concerns over FPL's violations, DEP administratively extended the NPDES/IW permit from May 5, 2010 to the present without acting on FPL's renewal application. T2-173:22-174:4, 229:1-25; T5-611:25-612:12, 627:4-628:18.

34. DEP's stated reason for not acting on the NPDES/IW permit renewal application was the need to issue the AO in order to provide reasonable assurance that FPL's CCS groundwater issues had been fully addressed. T2-174:5-176:1; T5-611: 25-612:12, 627:4-629:6.

The Power Plant Siting Act Site License

35. At the time of the uprate, DEP, the District, and Miami-Dade County already were aware of the negative impacts of the CCS on groundwater. T1-81:20-82:51.

36. Recognizing that the uprate was expected to increase water temperature and salinity in the CCS, DEP, the District, and Miami-Dade County agreed upon a Consolidated Condition – Condition X to the Site License – that dealt exclusively with groundwater plume and its impact to the surrounding area. JOINT-02, pp. 26-28.

37. Condition X required that, if the monitoring revealed the CCS was harming the water resources, same form of corrective action would be required. Id.

38. In issuing the Final Order, the Siting Board also created a condition of certification that incorporated the existing permits governing the CCS, including the NPDES/IW Permit. Condition XI states that a violation of these permits is considered to be a violation of the Conditions of Certification.JOINT-02-000028.

39. Condition X also required the District and FPL to enter into the Fifth Supplement, requiring a more extensive monitoring plan to delineate the vertical and horizontal extent of the CCS groundwater plume and to characterize its water quality impacts. JOINT-07-000053.

40. As part of the monitoring plan, the radioactive isotope tritium was used by the District and DEP to identify saltwater in the aquifer that originated from the CCS. Tritium occurs in very low background levels, but is a by-product of nuclear power generation by Units 3 and 4. The District established 20 pCi/L of tritium as a threshold level. DEP-11-000005. Saltwater containing tritium above this level was effectively "fingerprinted" as CCS water. T1-117:18-118:3; T1-119:13-18; T2-168:12-17; T2-209:22-210:3; T2-274:23-275:5; T2-277:8-10.

41. For the purposes of these findings of fact, the relevant monitoring wells include: TPGW-5 (approximately three miles west of the CCS); G-21 and G-28 (approximately four miles west of the CCS; and TPGW-7 (approximately 4.5 miles west of the CCS). See ACI-34.

42. In 2012, FPL reported that 24% to 46% of the saline groundwater (based on chloride and tritium concentrations) sampled in monitoring well TPGW-5D originated from the CCS. TPGW-5D is located about three miles west of the CCS in what had always been Class G-II potable groundwater prior to FPL's operation of the CCS. ACI-11-000637.

43. In 2012, FPL reported hypersaline CCS water near the base of the Biscayne Aquifer around monitoring wells G-21 and G-28, and determined that hypersaline CCS water has migrated at least four miles west of FPL's zone of discharge since the CCS has been in operation. JOINT-01, ¶ 23; T2-208:15-209:25; T5-775:20-777:19.

44. As a result of this information, the District notified FPL under the terms of the Fifth Supplement:

> Based on technical evaluation of all available information, the SFWMD has determined that saline water from FPL's Turkey Point Power Plant cooling canal system (CCS) has moved westward of the L-31E canal in excess of those amounts that would have occurred without the existence of the CCS and has moved into the water resources outside the plant's property boundaries.

JOINT-03.

Available Data Shows the CCS Has Caused Violations of State

Groundwater Standards.

45. In 2012, CCS water was found in the groundwater of the Biscayne Aquifer at least four miles west/northwest of the CCS. DEP-11, p. 8; T1-140:22-141:18; T2-249:4-13.

46. Monitoring well G-21, which has been fresh since 1975, turned salty around in 2001. DEP-11-000018. Since that time, groundwater at G-21 has turned from Class G-II potable water in the year 2000 to almost 10,000 mg/L TDS in 2012, which would render the groundwater at that location non-potable (>10,000 mg/L TDS). DEP-11, p. 18.

47. In 2009, DEP documented the sodium levels in well G-21 (at a depth of 58 feet) at 1,640 mg/L, more than 10 times the primary groundwater standard for sodium. ACI-66. By 2012, sodium levels in well G-21 had increased to 2,800 mg/L. ACI-11-000263.

48. In 2009, monitoring well G-28 (at the 58 foot depth) contained sodium levels of 6,750 mg/L – 40 times the primary groundwater standard. ACI-66. Sodium levels increased to 7,800 mg/L by 2012. ACI-11-000263. Other wells west of the CCS (BBCW-4, BBCW-5, FKS-4) showed sodium levels as high as 17,200 mg/L, more than 100 times the primary standard. ACI-66; ACI-34.

49. Sodium is a primary groundwater standard, and FPL is not permitted to cause a violation of the primary standard for sodium beyond its zone of discharge. T2-202:19-203:2. FPL's CCS has been continuously causing increasing violations of the

primary standard for sodium in Class G-II potable groundwater west of the CCS at least as early as 2009, and likely earlier. ACI-66; T2-209:20-25.

50. Groundwater quality within the deep monitoring horizons of monitoring wells G-21 and G-28 (which extend to a depth of ~58 feet below land surface) has degraded from Class G-II potable to G-III non-potable since the CCS was built. JOINT-01, ¶ 20; T3-339:9-22; T5-775:16-777:19.

51. The District concluded in 2013 that CCS water is present in high percentages in portions of the Biscayne Aquifer that previously contained G-II groundwater. T2-278:5-279:2; DEP-07.

52. In 2013, the deep Aquifer water at well TPGW-7 (historically fresh water) began to show signs of saltwater intrusion. Salinity and TDS have rapidly increased in TPGW-7 since then as a result of saline water being pushed westward by the CCS plume. T1-117:12-118:3; T2-194:2-16. In 2013 and 2014, the TDS levels measured at TPGW-7 at the deep monitoring horizon were less than 10,000 mg/L, indicating Class G-II groundwater, but the sodium levels at TPGW-7 now exceed 160 mg/L, which violates DEP's primary groundwater standard for sodium. T2-209:4-8.

53. DEP and the District have concluded that the CCS is causing the interface between G-II and G-III groundwater to move

west. JOINT-01, ¶ 25; T1-122:25-123:7, 127:16-22, 130:10-19; T2-185:17-186:15, 251:13-16; T3-339:15-22; T5-747:24-748:4. Moreover, as CCS water moves west, it pushes other, non-CCS saltwater in the aquifer in front of it, advancing the saltwater/freshwater interface. T1-117:21-118:3.

54. Stated another way, the continuous seepage and resulting groundwater plume of CCS water has and continues to consume usable portions of the Biscayne Aquifer - steadily converting Class G-II potable water to Class G-III non-potable water as it moves west through the Biscayne Aquifer. As Philip Coram testified on behalf of DEP:

> DEP has determined that "[t]he westward migration of the saltwater/freshwater interface, it harms the water of the resource, of the State because it makes less fresh water available for environmental resources such as wetlands but also users of that water using that potable water either for drinking water purposes or agricultural purposes. So it's making less fresh water available."

T1-127:7-15; see also T2-279:14-280:10; T5-747:24-748:4.

The Administrative Order

55. DEP issued the AO on December 23, 2014 under the authority of §§ 403.061(8) and 403.151, Fla. Stat. JOINT-01.

56. The AO was not considered to be a consent order, because it did not address a particular violation. T5-619:4-10. Ultimately, DEP describes the AO as a hybrid between an administrative order and a consent order. T5-619:11-17.

57. The AO orders FPL to prepare and submit to DEP a "CCS Salinity Management Plan." According to the AO, the "primary goal" of the Management Plan is to "reduce the hypersalinity of the CCS ***to*** abate westward movement of CCS groundwater ***into*** class G-II (<10,000 mg/L TDS) groundwaters of the State." JOINT-01, ¶ 37.a. (emphasis added).

58. In order to accomplish the AO's primary goal, FPL must meet two requirements or "success criteria." The first criterion is that FPL must reduce the annual average salinity within the CCS to 34 PSU within four years of the effective date of the Management Plan. JOINT-01, ¶ 37.a.

59. The second criterion is that FPL must demonstrate "decreasing salinity trends" in monitoring wells TPGW-1, TPGW-2, TPGW-13, L-3, and L-5. JOINT-01, ¶ 37.a. All of these wells are located directly beneath the CCS or immediately adjacent to the CCS to the west, and are the closest wells to the CCS. T2-166:4-17; ACI-34. This criterion ignores the fact that for decades the hypersaline CCS plume has spread miles west into the aquifer as detailed in the AO's findings of fact. JOINT-01. The criterion is expressly written to allow this plume to remain in the aquifer and to further spread for decades into the future.

60. The AO does not define the term "decreasing salinity trends." The AO does not quantify any particular or measurable increment of decrease, in PSUs or any other measure. Any

reduction of salinity in the groundwater beneath the CCS would satisfy the second criterion. JOINT-01, ¶ 37.a.

61. The AO does not define the term "trend" using any measurable time period or relation to consecutive sampling schedules. The second criterion, lacks any meaningful, predictable, or measurable criteria. JOINT-01, ¶ 37. a.

62. The two criteria in paragraph 37.a. of the AO, taken together, do not bear any direct or measurable relationship to the location or movement of the western edge of the CCS plume or the associated saltwater/fresh water interface. The AO success criteria are not related to the western advance of the plume or the fresh water/saltwater interface, nor do they require, that it actually slow, stop, or reverse. T5-780:4-12 (the AO monitoring wells "are absolutely not adequate to document the movement of the saltfront on the western edge.").

The AO Authorizes Past, Present, and Future Violations of the Department's Groundwater Standards.

63. DEP determined in the AO that the westward migration of the saline CCS water "must be abated to prevent ***further*** harm to the waters of the State." JOINT-01, ¶ 25 (emphasis added). "Abate" does not mean to halt or stop as defined by the AO. The term "abate" in the AO is defined to mean "to reduce in amount, degree or intensity; lessen; diminish," and "abate westward movement" is solely measured under the second criterion in

paragraph 37.a., which lacks any measureable, definable standards. JOINT-01, ¶ 37.a. By the AO's terms, DEP acknowledges that there has already been harm to the waters of the State from the westward migration of CCS water for decades. The AO criteria are not met by stopping this harm from continuing, but only by lessening further harm by an unspecified amount. "Further harm" is not prevented. Compliance with the AO success criteria is not measured by any relation back to this harm. DEP repeatedly conceded that the AO is a "good first step," but admitted that it will not address harm already done or prohibit, but only lessen the rate of, further harm. JOINT-01, ¶ 30; T1-86:25-87:7.

The AO Authorizes Continuing Harm to State Groundwater Resources and Impairment of the Reasonable and Beneficial Use of Adjacent Waters.

64. There is a fresh water lens in southeast Miami-Dade County that "is an important natural resource that supports critical marsh wetland communities and is utilized by numerous existing legal water uses including irrigation, domestic self-supply and public water supply." JOINT-01, ¶ 11; see also T2-186:10-187:2, 250:4-20.

65. The AO authorizes the CCS plume to continue pushing westward into this fresh water lens. T2-187:3-12. In fact, FPL can be in compliance with the terms and success criteria of the AO even though its plume is continuing to move the interface between G-II and G-III groundwater west into the fresh water

lens. Id.

66. The CCS plume also is expanding northwest and is nearing public water supply well fields. T2-185:17-186:15, 301:12-19. CCS water containing elevated (up to 10 times the 20 pCi/L threshold) tritium and elevated salinity is documented west of the Homestead speedway, which is less than a mile from the Newton public water supply well field. DEP-11, p. 8; T1-143:5-9; T5-746:9-747:4, 768:11-18.

67. In sum, while DEP and FPL characterize the AO as an enforcement order, the AO actually authorizes FPL to continue the conduct it was supposed to stop – the westward advancement of CCS pollution into the potable groundwater of the State.

FPL and District Modeling Supporting the AO Predicts Continuing Migration of CCS Water Into Class G-II Potable Groundwater.

68. The District's groundwater modeling supporting the AO shows hypersaline water from the CCS has continued to move into Class G-II potable groundwater from at least the year 2000 to the present and will continue to move west for at least the next 30 years. DEP-10, p. 38; T3-398:14-403:12. The District analysis shows that the saltwater front associated with the CCS plume has advanced from G-21 to TPGW-7 – a distance of 4,000 feet – in the last 10 years. DEP-13, p. 2.

69. The District's groundwater modeling supporting the AO only analyzed the scenario of adding 14 MGD of water to the CCS

under the proposal described in paragraph 28 - 32 of the AO, to reduce CCS salinity to the AO target of 34 PSU. T2-375:14 – 376:9. The District's modeling concluded that the CCS water will freshen to meet the AO criteria of 34 PSU, and the groundwater beneath and immediately adjacent to the CCS will also become less saline. Tr. 372; DEP 10.

70. However, while the AO criteria are met, the District modeling also shows that CCS water will be pushed through the bottoms of the canals, and down into the aquifer where it will encounter the denser CCS plume. The denser, hypersaline water will then be pushed out into the aquifer, away from the CCS and in all directions. DEP-10, pp. 38-40; T3-372:7-19.[10]

71. The District's groundwater modeling supporting the AO shows that, even if the AO success criteria are met it is only met by displacing the existing CCS pollution to the west. The G-II/G-III interface will still continue to be pushed westward, past ACI's property and the Newton public water supply well field, at least through the year 2040. DEP-11, pp. 24-26.

72. While FPL and DEP suggest that there are many other factors that may influence saltwater orientation and movement in

[10] According to the District's groundwater modeling supporting the AO and the testimony of Mr. Giddings, the addition of 14 mgd of water into the CCS will create a hydraulic barrier just west at the base of the CCS trapping the CCS plume to the west of the CCS where it moves outward while slowly mixing with fresher water in the aquifer over the next 30 years. T-373:1-5: DEP 10, p. 26.

southeastern Miami-Dade County[11], neither FPL nor DEP could present ***any*** evidence in the form of analysis or modeling to suggest that any of these factors, other than the CCS, have anything other than a beneficial impact on saltwater intrusion in the area. T2-194:17-196:25, 213:9-215:20, 261:14-266:4. DEP and FPL witnesses could offer only generalized, unsupported conjecture on the issue.

73. By contrast, District modeling shows that, if the CCS had been maintained near the salinity of sea water since its construction, with all other factors being equal, there would have been no hypersaline plume and the G-II/G-III interface would not have moved west. T3-408:23-410:23; DEP-10 p. 27-28 (shown as the SR_SFWMD-SEA model simulation).

The AO Preempts Future Enforcement Action Against FPL for Continuing Groundwater Standards Violations Described in the AO.

74. DEP and FPL assert that the AO permits DEP to take additional action against FPL if it is determined that CCS water is adversely affecting legal users or presents other harm to the water resources of the State. T2-168:8-17. They point to paragraphs 49 and 59 of the AO to support this assertion. JOINT-01-000009; T2-191:2-17.

[11] DEP lists sea level rise, storm surges, the CCS, groundwater withdrawals, mining, land use practices, other private uses, and local and regional water management actions as factors influencing saltwater orientation and movement. JOINT-01, ¶ 16.

75. Paragraph 49 of the AO only allows DEP to initiate consultation with FPL, and only if the implementation of the Management Plan "has not achieved the goals of the Management Plan[.]" JOINT-01, ¶ 49. As noted above, however, the primary goal of the Management Plan is to reduce the salinity of the CCS, and this goal is achieved simply by showing an annual average salinity of 34 PSU ***within the CCS*** and unquantified "decreasing salinity trends" ***within and immediately adjacent to the CCS***. JOINT-01, ¶¶ 37.A, 47.

76. If these two things are demonstrated, the AO does not authorize DEP to take further action against FPL under AO paragraph 49. JOINT-01, ¶ 49.

77. Paragraph 59 is similarly toothless. In this paragraph, DEP reserves the right to take legal action to address statute or rule violations, but only to the extent they are not resolved by the AO. JOINT-01, ¶ 59. Despite report after report documenting the worsening groundwater conditions in the Biscayne Aquifer, DEP has declined to find any statutory or rule violations and considers the AO as the resolution of this issue, sufficient to enable it to issue the NPDES/IW permit. T2-174:5-175:24.

78. DEP knows and has known for years that CCS water has moved outside of FPL's zone of discharge; DEP knows and has known that CCS water is causing significant exceedances of the

primary groundwater standard for sodium west of the CCS; DEP knows and has known that CCS water has caused and is causing the G-II/G-III interface to move westward into potable groundwater; and DEP knows and has known that CCS water is causing harm to the water resources of the State. Notwithstanding, DEP claims that FPL has not violated State groundwater standards. T1-87:17-90:9. For DEP to suggest that it will take enforcement action against FPL even if FPL meets the AO success criteria is, frankly, disingenuous.

CONCLUSIONS OF LAW

79. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties pursuant to section 120.57(1), Florida Statutes.

Standing

80. In order to have standing to participate as a party, a person must have substantial rights or interests that reasonably could be affected by the agency's action. See St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051 (Fla. 5th DCA 2011) (citing Palm Beach Co. Env'l Coalition v. Florida Dept. of Env'l Protection, 14 So. 3d 1076 (Fla. 4th DCA 2009)).

81. The evidence adduced at hearing shows that ACI owns property and has a legal right to use water resources and to conduct validly permitted mining operations, both of which will

be substantially affected if DEP administratively authorizes FPL's CCS water to remain in the Biscayne Aquifer and continue to migrate westward to and through ACI's property.

82. Also, the AO could act as a "permit shield" to prevent separate action by ACI against FPL or DEP to address CCS water impacts to ACI's property, because these impacts are predicted by FPL and District modeling to occur within the next 30 years, and the AO allows FPL to claim success even though westward movement of the CCS water will not cease.[12] Thus, ACI has standing to participate as a party to this proceeding. See also T4-588:10-591:14.

DEP is Violating Its Legal Duty to Prohibit Water Pollution.

83. Article II, Section 7 of the Florida Constitution requires abatement of water pollution and conservation and protection of Florida's natural resources.

84. Under § 403.061(10), Fla. Stat., DEP has the power and duty to prohibit water pollution and to develop a water classification system to group waters into classes according to their present and future most beneficial uses. DEP is required

[12] Section 403.412, Florida Statutes, allows a private citizen to enforce the laws protecting the air, water, and natural resources of the state only after filing a complaint with the responsible state agency and only if the agency receiving the complaint fails to take "appropriate action." Fla. Stat. § 403.412(2)(c). DEP and FPL undoubtedly would contend, as they do in this case, that the AO is appropriate action.

to protect the present and future most beneficial uses of groundwaters "to ensure the availability and utility of this invaluable resource." Rule 62-520.300(1)(g), F.A.C.

85. Pursuant to this authority and duty, the Department has classified the State's groundwaters as set forth in Rule 62-520.410, F.A.C. Class G-II waters are designated for potable water use. Class G-III waters are designated for non-potable use.

86. Reclassification of groundwater may be accomplished only as prescribed in statute and rule, and requires a petition, publication of notice, and a public hearing before the Environmental Regulation Commission. See § 403.061(10), Fla. Stat., and Rule 62-520.410, F.A.C.

87. DEP has not reclassified any waters within the Biscayne Aquifer from G-II to G-III except for the zone of discharge beneath the CCS. The mere fact that DEP has allowed FPL to pollute Class G-II waters beyond its zone of discharge such that total dissolved solids in those waters exceed 10,000 mg/L does not effectuate a reclassification of those waters from Class G-II to Class G-III. Such an application of the rules would render groundwater standards meaningless.

88. The purpose of requiring monitoring of a zone of discharge "is to ensure that the permitting of zones of discharge, or the granting of exemptions, will not cause a

violation of groundwater standards. Groundwater monitoring is intended to allow predictions to be made of the movement and composition of the discharge plume and compliance with applicable state groundwater standards ***at the boundary of the zone of discharge***." Rule 62-520.310(13), F.A.C. (emphasis added).

89. DEP takes the position that FPL is exempted by rule from complying with secondary drinking water standards outside of its zone of discharge. However, Rule 62-520.420, F.A.C. still requires FPL to comply with primary drinking water standards outside of its zone of discharge, and FPL also must comply with the Minimum Criteria for Groundwater both within and outside of its zone of discharge. Rules 62-520.310(14) and 520.400, F.A.C.

90. FPL's discharges of CCS water into the groundwater west of the CCS have violated and are continuing to violate the primary groundwater standard for sodium, as DEP has documented sodium levels as much as 100 times higher than the primary standard of 160 mg/L in wells west of the CCS, and the CCS is the only possible source in the area for these excessive sodium levels. Elevated tritium levels identify the CCS as the cause.

91. FPL's discharges of CCS water into the Biscayne Aquifer also violate the Minimum Criteria for Groundwater (Fla. Admin. Code R. 62-520.400(1)). Because of FPL's CCS pollution, the Biscayne Aquifer is not "free from" discharges that pose a

serious danger to the public health, safety, and welfare; create a nuisance; and impair the reasonable and beneficial use of the Class G-II potable waters outside and west of the FPL zone of discharge. DEP acknowledges that CCS water is moving the interface between Class G-II and Class G-III groundwater, which directly impairs the reasonable and beneficial use of the Class G-II water.

The AO is Unauthorized and Invalid Agency Action.

92. The AO is not a reasonable exercise of discretion because it authorizes the continued westward movement of the G-II/G-III interface, which impairs the reasonable and beneficial use of G-II waters within the Biscayne Aquifer. Also, the AO does not meet the legal criteria for any one of several potentially authorized agency actions to address FPL's pollution of the Biscayne Aquifer.

A. The AO is not a Consent Order.

93. In Sarasota County v. Dep't of Envtl. Reg. and Ronald Falconer, 1987 WL 62044 (Fla. Dept. Env. Reg.), the Florida Department of Environmental Regulation identified two "classes" of consent orders and the test under which it evaluated each class:

> There are two classes of consent orders that have been issued by the Department. The first class ... serves as authorization for a permittable type of activity that has not yet been conducted or is ongoing in nature and is the type of activity more properly the subject of a permit application. It was a consent order of this class that was at issue in Williams v. Moeller and DER, 8 FALR 5537 (1986).... The hearing officer in that case properly determined that the

> consent order should be reviewed as a permit application, as the Department should have handled the matter in the first place. The second class of consent order is issued by the Department to resolve an alleged violation of statute or rule resulting from a facility being constructed without a permit, or from a facility causing pollution that must be ameliorated, or both. Consent orders of this class are issued to settle existing, outstanding violations of law, and may require any or all of the following as the specific circumstances of each case dictate: payment of penalties, reimbursement of Department costs, payment of damages to the environment, or remedial action.
>
> * * *
>
> When the challenged consent order is a vehicle for resolving existing violations of law ... the Department and the settling party must prove not reasonable assurance, but reasonableness of the consent order.

94. DEP and FPL's reasoning that the AO is a consent order is that the AO "is a vehicle for resolving an alleged violation of Condition X – i.e., the Department's determination that 'the monitoring data from the 2009 Monitoring Plan indicates harm or potential harm to the waters of the State.'"

95. A Consent Order is a primary, "front-line" enforcement document used by DEP to immediately address violations. Consent orders are final orders of the Department to which the Respondent "consents," thereby waiving the Respondent's right to challenge the terms of the consent order. Consent orders also act as contractual settlement agreements.

96. In the case of existing violations, a consent order

typically acknowledges past violations and mandates projects and enhancements that are designed specifically to redress those violations.

97. A Consent Order would, by definition, have the advance agreement of the permittee to the terms and underlying facts set forth in the Consent Order, thus expediting enforcement litigation, should that become necessary.

98. The AO does not contain any of the features of a DEP consent order. There is no case style indicating an adversarial enforcement proceeding. There is no acknowledgement of violations that are being addressed, no penalties or corrective actions that are intended to fully and adequately address the violations, and there is no signature of all respondents formally consenting to the findings and terms of the order. The AO's Notice of Rights even affords FPL the right to challenge the AO.

99. By contrast, administrative orders are typically are used to allow DEP to issue a permit under circumstances where the permit otherwise would be denied. Their primary purpose is to establish a schedule for achieving compliance with permit conditions. AOs are are primarily used under the circumstances in § 403.088(2)(e), Fla. Stat., to enable a discharge to be permitted so long as full compliance is achieved in a reasonable time. AOs also function to provide a "permit shield" to the

permittee for noncompliant sources under the circumstances set forth in the statute.

100. In the instant case, the AO is a hybrid form of agency action that grandfathers legacy pollution from the CCS while authorizing continuing pollution of potable groundwater in lieu of meaningful enforcement of DEP's groundwater standards.

B. The AO Attempts to Create a "Bridge Permit", but it Does Not Meet the Requirements of Section 403.088, Florida Statutes.

101. DEP considered the AO as an important "bridge" to provide reasonable assurance for the re-issuance of the expired Turkey Point NPDES/IW permit. However, the AO is an unauthorized and wrongful attempt to issue a bridge permit, because it does not meet any of the statutory criteria for a bridge permit as set forth in Section 403.088(2)(e)1.-6., Fla. Stat., in the foreseeable future. Indeed, violations identified by the monitoring data will not be halted for decades, if at all. More problematic, however, is that DEP recognizes that such orders constitute "permit shields," which would impede DEP or citizen enforcement against FPL's past or ongoing pollution of the Biscayne Aquifer.

C. The AO Gives FPL A 30-Year Variance from Groundwater Standards, but Does Not Meet the Requirements for a Variance.

102. The AO behaves like a variance from DEP groundwater standards and permit requirements, but FPL has not petitioned

for and cannot meet the variance requirements in § 120.542, Fla. Stat.

103. Because the AO authorizes continuing violations of DEP's groundwater standards outside the CCS zone of discharge in lieu of enforcement requiring compliance with FPL's NPDES/IW permit and applicable regulations and standards, it "unnecessarily prolongs compliance" and can thus also be categorized as a "blanket variance" under Section 120.542, F.S. See Miccosukee Tribe of Indians of Florida v. United States, 2011 WL 1624977, *33 (S.D. Fla. 2011) (the Court "did not, and will not, allow the State of Florida to create a blanket variance through the guise of a 'compliance schedule' set forth in AOs without following the procedure required under the Clean Water Act and its implementing regulations.").

D. The AO is Agency Action Authorizing a Remedial Course of Action that Falls Well Short of Applicable Requirements.

104. Finally, the AO provides that it is issued pursuant to Sections 403.061 and 403.151, Florida Statutes, but it does not effectuate the control of water pollution within a reasonable time. The AO authorizes a remedial course of action, but it is wholly insufficient to eliminate outstanding and ongoing violations or require remediation of existing groundwater pollution that it proposes to "abate." Simply put, the AO is a "hybrid" form of agency action that DEP is not authorized to

take.

105. The decision concerning a Remedial Action Plan ("RAP") approval at issue in FOCUS et al. v. Lockheed Martin Corp. and FDEP, 2012 WL 36239 (Fla. Dept. Env. Prot.) is instructive. There, the order upholding the RAP was based on a detailed scrutiny of the RAP and a series of conclusions establishing that the RAP kept the responsible parties in compliance with all applicable requirements. However, unlike in FOCUS, DEP's proposed course of action in the AO does not ensure compliance with applicable groundwater standards and establishes flawed success criteria that rely on false assumptions regarding remedial methodology: that reducing salinity within the CCS by any method will correct existing or prevent future groundwater violations.

106. The AO does not require compliance – and in fact administratively authorizes continuing non-compliance – with applicable groundwater standards. By defining "success" as reducing salinity in the CCS and merely showing a reduced salinity "trend" in monitoring wells adjacent to the CCS, DEP accepts that discharges of pollution from the CCS outside of the CCS's zone of discharge will continue, and that FPL's contaminant plume will continue advancing westward into Class G-II potable groundwater.

107. DEP has not identified and cannot identify any

statutory or rule authority that allows it to issue an order approving continuing violations of its rules regulating the groundwater of the State without imposing timely remedial requirements to address those violations and imposing certain success criteria to ensure the violations cease.[13]

E. Even Assuming the AO is a "Pure Enforcement" Consent Order, it Fails the Reasonableness Test Applicable to Consent Orders.

108. Even if the AO were properly categorized as a "pure enforcement" consent order, the recent case of M.A.B.E Properties, Inc. v. FDEP, 2010 WL 6193098 (Fla. Dept. Env. Prot.) demonstrates that the AO would fail even the "reasonableness" test that Respondents seek to impose in this proceeding. In M.A.B.E, DEP entered into a consent order with a marina operator that imposed penalties and required corrective actions in connection with various permit violations and petroleum discharges to soils and sediments. The third-party petitioner challenged the consent order on the grounds that it was insufficient and did not address all violations. However, the ALJ rejected the third-party challenge, noting in his recommended order that,

> [a]lthough some violations were not addressed, some errors in calculating penalties were made, and in some

[13] The AO contains no requirement or criterion that westward movement of the CCS plume into G-II groundwater cease or slow down, only the assumption that it will slow down if salinity in the CCS is reduced.

> instances multiple violations were counted as a single violation for purposes of calculating a penalty, the Consent Order requires that the violator undertake corrective actions that are designed to remediate all prior violations, strictly comply with new terms and conditions, and subject it to stern penalties should future violations occur.

Id. at *22.

109. In other words, the remedial measures imposed through the consent order were sufficient to bring the respondent back into full compliance with all regulatory and permitting requirements that applied to the violations being addressed.

110. The AO, however, in no way requires full compliance, or cessation or remediation of ongoing pollution. Instead, it administratively authorizes FPL to maintain and expand its groundwater pollution for at least 30 more years according to District and FPL models. FPL can be in full compliance with the AO yet still violating applicable groundwater standards outside of its permitted zone of discharge. The AO, therefore, cannot constitute a reasonable exercise of DEP's enforcement discretion.

111. Moreover, Rule 62-520.700, F.A.C, requires DEP to take corrective action against FPL as follows:

> (2) When no imminent hazard exists, but the plume has extended beyond the zone of discharge or otherwise threatens or is likely to threaten in the foreseeable future to impair the designated use of an underground source of drinking water or surface water immediately affected by the ground water, the Department shall require the installation owner to take appropriate

> action to clean up, increase the degree of treatment prior to discharge, contain or otherwise correct the violation of water quality standards. The type of corrective action shall be based upon the following factors:
>
> (a) Direction of the plume movement in relationship to existing and potential sources of drinking water;
>
> (b) Plume size both in the areal and vertical dimensions;
>
> (c) Rate of migration of the plume;
>
> (d) Level of toxicity of the plume;
>
> (e) Rate at which the plume is being diluted;
>
> (f) The costs of clean up or other corrective action in comparison with the benefits to the public of such corrective action; and
>
> (g) Current and projected future use of adjacent ground and surface waters affected by the plume.

Considering the massive size of the plume, its westward, up-gradient migration over four miles beyond FPL's zone of discharge, and its continuing threat to Class G-II potable groundwater and public water supply well fields, the AO fails to meet DEP's corrective action obligations.

The AO Violates the Power Plant Siting Act

112. The AO purports to be issued pursuant to DEP's authority under §§ 403.061(8) and 403.151, Fla. Stat. However, DEP witnesses testified that the Order constituted an implementation of the Conditions of Certification – specifically, Condition X, but could have been issued as a modification to the Site License. T1-84:17-85:3; T1-129:9-18.

113. Regardless of whether or not the CCS is "certified" by the 2008 Site License for the uprate of Units 3 and 4, use of the CCS by Units 3 and 4 are still regulated under certain of the

Conditions of Certification.

114. The AO changes, modifies and adds to those conditions of certification by imposing specific criteria by which the CCS will be operated in conjunction with Units 3 and 4. However, this was accomplished outside of the Siting Act process. While the AO allows DEP or FPL to ultimately place portions of the AO into the Site License, no such action is required at any point.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Department of Environmental Protection issue a final order determining that Administrative Order Number 14-0741 is an invalid exercise of DEP's authority and is an unreasonable exercise of DEP's enforcement discretion. The AO lacks specific success criteria that FPL must meet to stop current and further violations of groundwater standards, including the Primary and Minimum Groundwater Standards, resulting from the continued westward movement of saline and hypersaline water from the CCS for years to come; and the AO fails to correct FPL's existing violations of groundwater standards because it does not include specific conditions requiring FPL to remediate and remove its saline and hypersaline groundwater plume from the Biscayne Aquifer.

Respectfully submitted, this

11th day of December, 2015.

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CERTIFICATE OF SERVICE

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